

# Silicon Valley Software Industry Coalition

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TO: Multistate Tax Commission Public Participation Working Group on Draft *Constitutional Nexus Guideline for Application of a State's Sales and Use Tax to an Out-of-State Business*

While the Silicon Valley Software Industry Coalition appreciates this opportunity to participate in the drafting of the above mentioned document, unfortunately we feel that rather than delve into the details of the draft, it is more appropriate at this time to address the goals of the draft itself. Furthermore, while we appreciate that the MTC has responded to our November 4 1996<sup>1</sup> comments on the January 95<sup>2</sup> draft, unfortunately we believe that the response was inappropriate.

In those comments we stated:

In this context we also question the nature of this document. Is this meant to be a guideline adopted by the states? If so, what are the implications are of a state "adopting" it? In states which clearly do cross the constitutional limitations it clearly has some value, especially if the adoption process includes adopting laws or regulations which bring the state back within constitutional nexus boundaries. But for states which are already well within the constitutional boundaries its "adoption" seems counter-productive and brings into question the MTC's aforementioned purpose of preventing the states from implementing such overreaching tax laws that Congress is once again called upon to step in and preempt overaggressive state tax policies. We highly recommend that the MTC give serious consideration to this question. We suggest that a two-pronged approach may be a way out of this conundrum - an educational document which expresses the fullest limitations beyond which a state may not go and a second document which delineates a minimum nexus standards approach - one clearly well within the boundary and steering well clear of any questionable areas. The document should include optional sections which the various states could adopt or not, as their own economic development policies dictated. A state could then choose where along the line between the two extremes it wished to be - keeping in mind other economic benefits in addition to sales tax revenue, such as, for example, job creation, and adopting an approach seeking those benefits if it felt that such an approach was in the state's best interest.

However, the current draft, rather than develop the recommended two-pronged approach, has simply abandoned the development of uniform nexus standards entirely. The current draft clarifies that adoption of the proposed guideline is not meant to replace state law, by stating that "This guideline does not address those state law considerations." However, the following

<sup>1</sup> <http://www.softwareIndustry.org/coalition/nxscmnts.html>

<sup>2</sup> <http://www.softwareIndustry.org/coalition/docs-htm/mtc-nxs2.html>

sentence "Determination of state statutory nexus is the province of the state legislatures." indicates that the MTC is completely abandoning uniformity efforts in the area of nexus. Consequently, while all confusion as to the purpose of the document has been removed, what remains raises another and more important question for both taxpayers and MTC member state legislatures alike, namely "**WHY ARE WE HERE?**" The purpose of the Multistate Tax Compact<sup>3</sup>, which MTC members states have enacted into law, is to:

1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
2. Promote uniformity or compatibility in significant components of tax systems.
3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.
4. Avoid duplicative taxation.

We fail to see how the current effort complies with those purposes. The business community has been expecting that this project would address uniform nexus standards and would replace the MTC's 1968 uniform nexus guidelines (attached). In 1986, after 36 states had adopted that guideline, the MTC withdrew it, apparently favoring instead the pursuit of litigation challenging then existing Supreme Court rulings on nexus. Those litigation efforts resulted in the *Quill* case, in which the states failed to overturn the previous Supreme Court decision. Now, 11 years after the original guidelines were withdrawn, and 5 years after the *Quill* decision, we see not a proposed updated uniform nexus guideline, but instead an exposition on what the MTC thinks the Supreme Court might now consider to be the nexus standard. We see no indication that the MTC can predict U.S. Supreme Court rulings now any better than they could in the *Quill* litigation.

If the MTC is to provide value to the states they must return to their goal of uniformity in state tax systems.

We urge the Public Participation Working Group to address not the details of the current draft, but the goal of the draft, and to reshape the project with the aim of setting a nexus standard for adoption in the states. Failing that, this project should be dropped.

Kaye Caldwell  
President

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<sup>3</sup> <http://www.mtc.gov/aboutmtc/COMPACT.HTM>

## **MTC 1968-1984 Nexus Standard**

From the MTC 6th Annual Report 7/1/72 to 6/20/73

### **SALES AND USE TAX JURISDICTION LIMITATION STATEMENT**

The following is the Sales and Use Tax Jurisdiction Limitation Statement with which all states, to the best of our knowledge, comply:

### **SALES AND USE TAX JURISDICTION STANDARD**

A vendor is required to pay or collect and remit the tax imposed by this Act if within this state he directly or by any agent or other representatives:

1. Has or utilizes an office, distribution house, sales house, warehouse, service enterprise or other place of business; or
2. Maintains a stock of goods; or
3. Regularly solicits orders whether or not such orders are accepted in this state, unless the activity in this state consists solely of advertising or of solicitation by direct mail; or
5. Regularly engages in any activity in connection with the leasing or servicing of property located within this state.

This state does not seek to impose use tax collection requirements on any retailer over whom the above standard does not confer jurisdiction in this state.